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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

D'MARCUS RASHAD HAYES,

Defendant and Appellant.

B298860

(Los Angeles County
Super. Ct. No. MA071575)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Shannon Knight, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Idan Ivri and Thomas C. Hsieh, Deputy
Attorneys General, for Plaintiff and Respondent.

D'Marcus Rashad Hayes appeals from a judgment entered after the jury convicted him of two counts of assault with a semiautomatic firearm for shooting at a passing car. The jury also found true Hayes personally used a firearm in the commission of the assaults. The shooting occurred after Hayes's two friends got into fights at a raucous house party. Hayes and his friends fled the party after a gunshot was fired. Approximately three minutes later, as Hayes was about to get into his car to go home with his friends, he fired several shots at a passing car with a man leaning out of the passenger-side window. On appeal, Hayes contends there was insufficient evidence for the jury to conclude his conduct was not justified by the lawful defense of his friends from an imminent threat of serious bodily injury. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Amended Information

An amended information charged Hayes with two counts of attempted willful, deliberate, and premeditated murder (Pen. Code,¹ §§ 187, subd. (a), 664; counts 1 & 2) and two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 3 & 4). The amended information alleged as to counts 1 and 2 Hayes personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and as to counts 3 and 4, Hayes personally used a firearm (§ 12022.5, subds. (a) & (d)). Hayes pleaded not guilty and denied the special allegations.

¹ All further statutory references are to the Penal Code.

B. *The Evidence at Trial*

1. *The People's case*

a. The June 3, 2017 shooting

In June 2017 Hayes was living in Lancaster with his cousin Brianna Dorsey and Anthony Brown, the father of Dorsey's child. Hayes had moved from Missouri the prior year and was staying on the couch in Dorsey's living room.

On the night of June 2, 2017 Hayes, Brown, and their friend Javery Francis attended a graduation party at a house on the west side of Raven Lane near the intersection of West Avenue J-5 in Palmdale. The house was located in a residential neighborhood. Hayes drove the two men to the party in his Ford Mustang coupe. They arrived at the party shortly after 11:30 p.m. and parked along Raven Lane about two houses from the party.

Brown testified that at some point during the party, Francis informed Brown and Hayes he had gotten into a fight and had been "whooped" by some men after he "hit on the wrong girl."² Although Francis was not bleeding, he was upset and injured, and the three friends decided to go home.³ As they were leaving, another man bumped into Brown, which escalated into a fight between Brown and the man in front of the house. Hayes and Francis were present during the fight but were not involved.

² Brown testified at trial after pleading no contest to a violation of section 32 as an accessory after the fact in connection with this incident.

³ Hayes told detectives at the time of his arrest that Francis was bloody after the altercation at the party.

The fight continued for about a minute, but ended when Brown heard a single gunshot that caused everyone at the party to scatter. Brown did not know where the gunshot came from, and he did not see anyone with a gun. However, he felt he was in danger from either a stray bullet or his involvement in the fight. Brown and Francis ran from the party and hid behind jet skis parked in a neighboring driveway. Hayes was not with them.

Two or three minutes later Brown determined “the coast was clear,” and he and Francis ran from their hiding place toward Hayes’s Mustang parked a short distance up the street. Brown got in the driver’s seat while Francis climbed into the rear seat through the passenger-side door. A few seconds later Hayes approached the passenger side of the Mustang, but then he stopped and walked back in the direction of the party. Brown started the Mustang and drove south on Raven Lane a short distance toward West Avenue J-5, planning to pick up Hayes. Brown stopped the car at the corner and reached across the car to push open the passenger-side door for Hayes to get in.

Just before Brown opened the door, Brown looked in his rear-view mirror and saw a car approaching with a man sitting on the window frame on the passenger side with his upper body leaning out of the car. Brown testified the car then slowed and stopped next to the Mustang.⁴ Brown was not sure what the man leaning out of the window was doing. Brown testified he ducked down out of fear, but he did not know of what. He explained, “There was a lot going on. I see guys out the window and they came toward me and I ducked down and I was nervous.” Brown

⁴ The video of the shooting admitted as Exhibit 2 shows the other car slowing from a high speed as it pulled alongside the Mustang, but it did not stop.

testified, after further questioning, that he ducked down to reach over to open the passenger-side door for Hayes. Brown then saw Hayes approach the passenger side of the Mustang, stop, raise his gun, and fire two or three gunshots at the other car, which made a U-turn at the intersection and drove off.⁵ Brown saw one or two other cars make a U-turn at the intersection around the same time. Brown shouted at Hayes to get in the car. After Hayes got in, Brown screamed to him, “What the fuck just happened[?]” Brown also told Hayes “he didn’t have to do that and it was pretty stupid of him.” Brown did not see anyone else with a gun during the incident, and he did not hear anyone in the other vehicle say anything.

Angela Alperin, who lived at the southwest intersection of Raven Lane and West Avenue J-5, heard the shooting. Sometime between midnight and 1:00 a.m. on June 3, 2017 Alperin was in her living room when she heard a single gunshot and the sound of tires screeching. Alperin ran out to her front porch. She heard more gunshots, and then a young man ran across her front yard and told her, “Get inside. There’s shooting.” The man hid by Alperin’s car, which was parked in her driveway. Alperin looked toward the corner of Raven Lane and West Avenue J-5 and saw a young, tall Black man wearing a hat standing by the passenger side of a faded blue Mustang. He fired three gunshots across the intersection in the direction of a house on the far corner from

⁵ When police detectives first interviewed Brown about the incident on February 7, 2018, Brown did not mention a vehicle pulling alongside the Mustang or describe anyone leaning out of the passenger side of the vehicle. Brown also did not tell the police he was concerned for his safety or ducked down in the Mustang.

where he was standing. The man then got in the passenger side of the Mustang, and the car drove off. At the time of the shooting, Alperin saw another car parallel to the Mustang make a U-turn, but she did not see anyone leaning out of the window of the car. The first gunshot Alperin heard sounded further away from the three shots fired together near her house.

b. The investigation and Hayes's arrest

At about 12:25 a.m. on June 3, 2017 Los Angeles County Sheriff's (LASD) Sergeant Lee Schriever responded to a call about a shooting on Raven Lane. By the time Sergeant Schriever and several deputies arrived on the scene, most of the partygoers had dispersed. The hosts of the party went inside their house, and they would not answer the door. Sergeant Schriever and the other deputies searched the area and found three shell casings in the front yard of a house at the northwest corner of Raven Lane and West Avenue J-5. Sergeant Schriever found a bullet hole in the garage door of the house on the southeast side of the intersection. LASD Detective Giovanni Lampignano later recovered the bullet from the garage for analysis.

Deputies obtained surveillance footage from video cameras mounted outside the home where the shell casings were found on the northwest corner of Raven Lane and West Avenue J-5. Three motion-activated cameras captured the incident.⁶ The surveillance video showed Hayes, Brown, and Francis arriving at

⁶ Portions of the video were shown several times at trial to Alperin, Sergeant Schriever, Detective Lampignano, and Brown, who identified himself, Hayes, and Francis in the video. The People also showed portions of the video during closing argument.

the party and parking the Mustang on Raven Street at around 11:34 p.m., according to a timestamp on the video. At 12:26 a.m. people started running from the party. Two minutes later Hayes walks slowly in the direction of the Mustang, then turns back and walks toward a car parked a significant distance behind the Mustang. About 30 seconds later Brown and Francis walk briskly toward the Mustang, followed by Hayes walking slowly. Brown and Francis get into the Mustang around 12:29 a.m.; Hayes then walks away from the car; and seven seconds later the Mustang begins to move forward toward the street corner. Brown then reaches across the Mustang's interior to open the passenger door. At this point another car with a passenger sitting on the window frame pulls alongside the Mustang, and seconds later, as that car makes a U-turn at the intersection, Hayes raises his gun and fires three shots in the direction of the moving car. Three minutes, 20 seconds elapsed from when people began to flee the party to when Hayes shot at the car.

On June 8, 2017 Deputy Garay was on patrol a couple miles from the scene of the incident when he pulled over a faded blue Mustang that matched Alperin's description and the surveillance video of the Mustang. Deputy Garay made a traffic stop and identified Hayes as the driver and owner of the Mustang.

On June 29, 2017 Hayes was arrested, and LASD deputies executed a warrant to search Dorsey and Brown's apartment where Hayes was staying. They recovered a Glock 23 semiautomatic .40-caliber handgun from a satchel sitting on the television stand in the living room, along with a piece of mail addressed to Hayes with the house address on it. LASD senior criminalist Phil Teramoto testified the shell casings recovered

from the shooting scene were ejected from the gun recovered from Dorsey and Brown's apartment. On the day he was arrested, Hayes called Dorsey from jail, and Dorsey told Hayes in a recorded telephone conversation that sheriff's deputies had searched through his belongings and found a gun. Hayes responded, "Man, I'm finna be, I finna be gone. . . . Man, cause man, . . . they got my shit man."

2. *The defense case*

Hayes testified in his own defense. He resided with Dorsey and Brown at their apartment in Palmdale. The gun recovered from their apartment belonged to Hayes, who kept it for protection. Hayes bought the gun off the streets in St. Louis for a low price and suspected it might be stolen.⁷

On June 2, 2017 Hayes drove Brown and Francis to the party on Raven Drive in his blue Ford Mustang, arriving at about 11:30 p.m. Hayes gave his car keys to Brown, who was the designated driver. At some point during the party, Francis approached Hayes and Brown "raved up like he was in a fight . . . like he'd just been jumped." Hayes and his friends decided to leave the party, but as they tried to pass through the front door, Brown and "some guy" "exchanged words" and began fighting. Brown and Francis fought with three men.

⁷ Hayes testified that when he told Dorsey he "finna be gone" after learning sheriff's deputies had found his gun, he was expressing concern he would face consequences for possessing a stolen firearm and not alluding to any involvement in the shooting on Raven Lane.

In the midst of the fight, Hayes heard a gunshot, and everyone at the party began ducking down and scrambling. According to Hayes “it was like pandemonium.” Hayes did not know where the shot came from, but it sounded close. When Hayes got home, he discovered he was bleeding from a scratch or graze on his arm, but he did not know whether the injury was caused by the gunshot, the altercation, or from “bumping with so many people at the party.”

In the commotion after the gunshot, Hayes lost sight of Brown and Francis and grew concerned they might have been injured or were in danger of being shot. Hayes pulled out his gun, but he kept it pointed down as he made his way to find them. Hayes spotted Brown and Francis outside, and the three men walked towards the Mustang. According to Hayes, Brown got into the driver’s side, and Hayes opened the passenger side door and lifted the seatback to allow Francis to climb into the back seat.⁸ Hayes then noticed two men standing next to a car behind the Mustang. One of the men, who was standing on the edge of an open passenger door, said words like “that’s him with the pink shirt.” The man said this in an aggressive tone as if he was looking for the man in the pink shirt. Francis was wearing a pink shirt.

⁸ During Hayes’s testimony, his attorney played the surveillance video showing that Hayes did not open the passenger door or lift the seatback to let Francis in the car. Hayes acknowledged his memory of opening the door for Francis must have been mistaken.

Hayes did not get into the Mustang because he felt it was not safe. He did not know what the men in the other car intended, and he “didn’t want to be shot.” Instead, Hayes told Brown to pull the Mustang forward to the corner while Hayes headed in the direction of the other car to keep an eye on the men. He then made his way around a parked car to a position where he could safely get in the Mustang. However, after Brown began to pull the Mustang forward, Hayes noticed the two men had started their car and were “taking off with the guy hanging out of the window.”

Hayes saw the man leaning out of the window twist his body as his car approached the Mustang, and Hayes thought, “Man, he’s going to shoot—or he’s going to shoot somebody.” As the other car then pulled up alongside the Mustang, Hayes’s “reaction was just to start shooting.” Only a couple of seconds elapsed from the time Hayes noticed the passenger leaning out of the passenger window and his decision to shoot at the car. Hayes fired his gun so the men in the other car would “stop whatever they were doing and get away from us.” He did not intend to kill anyone.

On cross-examination, Hayes admitted he did not see any firearm other than his own during the incident. Hayes acknowledged that because there were other people returning to their cars at the time of the incident, the person who said “that’s him in the pink shirt” was “possibly” in one of the other cars, but Hayes could not be “100 percent sure” who made the comment. Further, as the car with the man leaning out of the window pulled up behind the Mustang near the corner, no one in the car said anything to Hayes or his friends. Hayes also acknowledged that when the gunshot went off at the party, he calmly walked

back toward the Mustang with a can of beer in his left hand while holding his gun pointed down in his right hand. Minutes later, when Hayes made his final approach to the Mustang, he slowed his pace and placed the beer in his pocket before raising his gun to shoot at the other car.⁹

C. *The Verdict and Sentencing*

The jury found Hayes not guilty on counts 1 and 2 of the attempted murder of John Does 1 and 2, but it was unable to reach a verdict on the lesser included offenses of voluntary manslaughter, and the trial court declared a mistrial as to manslaughter charges. On counts 3 and 4, the jury found Hayes guilty of assault with a deadly weapon on John Does 1 and 2. The jury also found true Hayes personally used a semiautomatic firearm in the commission of both assaults (§ 12022.5).

⁹ In rebuttal, Detective Lampignano testified about his interview with Hayes on the day of Hayes's arrest, and an audio recording of the interview was played for the jury. For the first half of the hour-long interview, Hayes denied any involvement in the shooting. After being shown the surveillance video, Hayes admitted he was at the party and gave an account of the shooting. Hayes told Detective Lampignano he was playing dice in the backyard when a large group of men rushed into the backyard, including a large Samoan man carrying a "big" firearm. Hayes later heard three gunshots from a small caliber gun at the party. After the party broke up, Hayes saw someone hanging out of the passenger-side window of the car, but the person got into the car before it started moving, and Hayes fired at the car because the windows rolled down just as the other car approached the Mustang.

The trial court sentenced Hayes to an aggregate term of 21 years, four months in state prison. The court selected count 3 for assault with a semiautomatic weapon of John Doe 1 as the base term. The court imposed the middle term of six years, plus 10 years for the firearm enhancement. On count 4 for the assault of John Doe 2, the court sentenced Hayes to two years (one-third the middle term of six years), plus 40 months for the firearm enhancement (one-third of the 10-year enhancement).

Hayes timely appealed.

DISCUSSION

A. *Standard of Review*

“In evaluating a claim regarding the sufficiency of the evidence, we review the record ‘in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’” (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142 [“To assess the evidence’s sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.”].)

““Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial

evidence.”” (*Penunuri*, at p. 142; accord, *People v. Mendez* (2019) 7 Cal.5th 680, 703.)

“‘The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.’ [Citations.] ‘We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.’” (*People v. Westerfield*, *supra*, 6 Cal.5th at p. 713; accord, *People v. Penunuri*, *supra*, 5 Cal.5th at p. 142 [“A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’” the jury’s verdict.”].)

B. *Applicable Law on Defense of Another*

The trial court instructed the jury with CALCRIM No. 3470 that “[d]efense of another is a defense to attempted murder, attempted voluntary manslaughter, and assault with a semiautomatic firearm[, and Hayes] is not guilty of those crimes if he used force against the other person in lawful defense of another.” Further, “[t]he defendant acted in lawful defense of another if: 1. The defendant reasonably believed that someone else was in imminent danger of suffering bodily injury; 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and 3. The defendant used no more force than was reasonably necessary to defend against that danger.” (CALCRIM No. 3470; see *People v. Clark* (2011) 201 Cal.App.4th 235, 250 [CALCRIM No. 3470 sets

forth elements of the defense of self-defense on an assault charge]; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [“the defendant must actually and reasonably believe in the need to defend”]; *People v. Sotelo–Urena* (2016) 4 Cal.App.5th 732, 744 [defendant must “actually and reasonably believe” the use of force was necessary].)

“To assess whether a belief was objectively reasonable, ‘a jury must consider what “would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.” [Citation.] It must assume “the point of view of a reasonable person in the position of [the] defendant,” taking into account “all the elements in the case which might be expected to operate on his mind.”’” (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014; accord, *People v. Humphrey, supra*, 13 Cal.4th at p. 1082.) It is a question for the jury whether a defendant’s use of force was “greater than that reasonable under the circumstances.” (*People v. Casares* (2016) 62 Cal.4th 808, 846 (*Casares*), disapproved on other grounds in *People v. Dalton* (2019) 7 Cal.5th 166.) “[D]eadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury.” (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629-630; see *People v. Pinholster* (1992) 1 Cal.4th 865, 966 [“right of self-defense did not provide defendant with any justification or excuse for using deadly force to repel a nonlethal attack”], disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) “The burden is on the People to prove that the use of force and violence was not in lawful self-defense.” (*People v. Tully* (2012) 54 Cal.4th 952, 1028; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 63 [“It ultimately is the prosecution’s burden to prove the absence of

justification beyond a reasonable doubt.”]; see CALCRIM No. 3470.)

C. *Substantial Evidence Supports the Jury’s Finding the Assaults Were Not Justified by Hayes’s Defense of Brown and Francis*

Hayes contends his convictions for assault with a semiautomatic firearm must be reversed because there was insufficient evidence from which the jury could conclude his firing of gunshots was not justified by his lawful defense of Brown and Francis from imminent harm. Hayes points to the chaotic scene in which a gunshot was fired at the party, then three minutes later a man standing next to a car behind the Mustang (with Brown and Francis inside) pointed out Francis in the pink shirt, and then the car approached the Mustang with a man hanging out of the open window. But substantial evidence supports the contrary inference—that Hayes did not reasonably believe Francis and Brown were in imminent danger of suffering serious bodily injury; and if they were in danger, Hayes used more force than necessary to protect them under the circumstances.

Hayes testified he believed Brown and Francis were in imminent danger of suffering bodily injury because the men in the other car menacingly said, “That’s him with the pink shirt,” an apparent reference to Francis. But Hayes also conceded he was not sure the occupants of the other car were the ones who made the comment about Francis’s pink shirt. Even if Hayes believed Brown and Francis were in imminent danger, there was substantial evidence to support the jury’s finding that belief was not objectively reasonable, considering the point of view of a reasonable person in a similar position with similar knowledge.

(*People v. Humphrey, supra*, 13 Cal.4th at p. 1082; *People v. Brady, supra*, 22 Cal.App.5th at p. 1014.) Although the scene at the party was chaotic following the firing of a gunshot, by the time of the shooting, Brown and Francis were safely inside the Mustang. Neither Brown nor Hayes saw anyone with a gun in the other car. Nor was there evidence the man leaning out of the car made a comment or gesture suggesting he was going to pull out a gun, at most twisting his body as the car pulled alongside the Mustang. Moreover, the video of the incident shows that the other car had already pulled past the Mustang and was in the process of making a U-turn in the intersection when Hayes started shooting.

Further, according to Brown, Hayes did not say anything to Francis or Brown prior to shooting at the other car to indicate the men posed a threat. To the contrary, Brown told Hayes after the shooting that Hayes “didn’t have to do that” and “it was pretty stupid of him.” Although Brown testified he ducked down in the car out of fear, Brown did not tell this to Detective Lampignano during his interview, and at trial Brown offered an alternative explanation that he ducked down to reach across the car to open the passenger-side door for Hayes.

Moreover, the jury could have disbelieved Hayes’s self-serving account of the shooting. As the Supreme Court explained in *Casares, supra*, 62 Cal.4th at page 846, in concluding the jury could have rejected the defendant’s “self-serving version of events” in which he acted in self-defense, “[T]he testimony of the sole percipient witness did not suggest that any of the occupants of the white car displayed or otherwise used a weapon, and defendant himself told the investigating officer he never saw a gun. Moreover, when defendant shot at the car, it was traveling

away from him and thus, inferably, did not present an imminent threat.” Hayes’s trial testimony was inconsistent with his earlier statement to Detective Lampignano that he shot at the men in the other car because one of the occupants was rolling down his window as the car approached the Mustang. Further, after police found his gun, Hayes told Dorsey in a jail call he “finna be gone.” The jury may have doubted Hayes’s explanation he was concerned only because he had purchased the gun off the streets in St. Louis.

Hayes’s testimony was also inconsistent with his own testimony and that of Brown. Hayes initially testified that he, Brown, and Francis walked to the car together and Hayes helped Francis climb into the back seat. According to Hayes, that was when the man in the car behind the Mustang made the menacing comment about the pink shirt. But Hayes later conceded he had confused the order of events. As Brown testified (and the video shows), Brown and Francis got into the car just as Hayes arrived. Hayes did not help Francis get into the car, instead leaving and walking back in the direction of the party as Brown drove toward the intersection. Shortly thereafter Brown saw the other car approach and pass the Mustang, and Hayes started shooting.

It is the role of the jury to determine the credibility of witnesses and resolve conflicts in the testimony. (*People v. Mendez, supra*, 7 Cal.5th at p. 703; *People v. Penunuri, supra*, 5 Cal.5th at p. 142.) Here, there was a substantial evidence from which the jury could have discounted Hayes’s inconsistent and contradictory testimony. Even if a jury could have believed Hayes’s account of the shooting, because substantial evidence supported the alternative inference Hayes did not act with justification or used more force than was necessary, reversal is

not warranted. (*People v. Westerfield*, *supra*, 6 Cal.5th at p. 713; *Penunuri*, at p. 142.)¹⁰

¹⁰ Hayes contends the weakness of the prosecution's case is shown by the fact the jury found Hayes not guilty of attempted murder and deadlocked on whether he was guilty of the lesser offense of voluntary manslaughter. But a conviction of attempted murder or voluntary manslaughter requires intent to kill or conscious disregard for life, neither of which is an element of an assault. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 890 [attempted murder]; *People v. Landry* (2016) 2 Cal.5th 52, 98 [attempted voluntary manslaughter].) Accordingly, the jury's failure to convict on attempted murder or voluntary manslaughter does not raise an inference the prosecution was unable to prove the lawful defense of another. The cases relied on by Hayes that consider the import of an acquittal or hung jury in determining whether a trial error was prejudicial are distinguishable. (See, e.g., *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [where first trial resulted in a hung jury, error occurring only during second trial was prejudicial], disapproved on other grounds in *People v. Mendoza* (2011) 52 Cal.4th 1056; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [erroneous admission of testimony was prejudicial where jury acquitted defendant of two of three charges related to alleged molestation].)

DISPOSITION

The judgment is affirmed.

FEUER, J.

We concur:

SEGAL, Acting P. J.

DILLON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.